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No. 234

In the Supreme Court of the United States

OCTOBER TERM, 1932

THE UNITED STATES OF AMERICA, PETITIONER

v.

HENRY PRENTISS & COMPANY, INC.

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF FOR THE UNITED STATES

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SUPPLEMENTAL BRIEF FOR THE UNITED STATES

At the argument of this case on December 9, 1932, the respondent presented to the Court, both orally and in its brief, a point which, in the view of the petitioner, is not included within the questions to be reviewed under the writ, and which, for that reason had not been prepared or discussed by the petitioner in its brief. As the brief of the respondent was not filed until the day the argument began, the petitioner was unable to file a reply brief on the point, and for that reason this Court granted leave to the petitioner to present its views upon the point involved.

STATEMENT

In addition to the facts set out in the petitioner's main brief (pp. 2–4) the following facts are pertinent to the present issue. These facts are conceded by the respondent in its brief (pp. 29–31):

The respondent was organized in August, 1916, with an authorized capital stock in the par amount of $10,000. (R. 39.) This stock was issued to the Prentiss Tool & Supply Company for 100 shares of stock of the Atchison, Topeka & Santa Fe Railway Company. (R. 40.) Immediately thereafter the capital stock of the respondent was increased to $500,000 par value (R. 40), and the remaining 4,900 shares were issued to the Prentiss Tool & Supply Company for all of its property and assets. (R. 40.) This stock was distributed *pro rata* to the stockholders of the old company (R. 24) so that after the transaction the interests of the stockholders were the same as before. The respondent corporation was organized for the purpose of acquiring the property and business of the Prentiss Tool & Supply Company (R. 23) and at the direction of the latter, issued its stock to the stockholders of the Prentiss Tool & Supply Company. (R. 24.)

The assets of the old company were transferred from its books to the books of the respondent at the same figures, with the exception of the necessary adjustment in capital and surplus. No item was shown on the books of either company, or on the balance sheets prepared at the time of the transfer

covering the intangible assets here involved. (R. 40.) The intangibles had a value in excess of $300,000 (R. 21) but the parties have stipulated that if any sum should be included in the respondent's invested capital on account of these intangibles, it should not exceed $107,500 in amount. (R. 21.)

The Commissioner of Internal Revenue, in computing the respondent's invested capital for the years 1918 and 1920, did not include any amount on account of the acquisition by the respondent of the intangibles from the Prentiss Tool & Supply Company. (R. 21.)

STATUTES INVOLVED

The statutes involved are set forth in the Appendix, *infra*, pp. 21–24.

ARGUMENT

I

THE JURISDICTION OF THIS COURT TO REVERSE THE JUDGMENT AT THE INSTANCE OF THE RESPONDENT

The question which the respondent has argued in its brief with respect to its invested capital is not related in any way to the question presented by the Government in its petition for certiorari. It is a wholly distinct contention involving a different taxable year. The respondent did not file a petition for certiorari, and for this reason we respectfully suggest that this Court is without jurisdiction to review this part of the judgment below.

The respondent, in presenting this question, is not merely defending the judgment below; it is attacking the judgment. The respondent is not seeking to support the judgment on a ground rejected by the court below; it is seeking to have the judgment reversed.

This Court has decided that a respondent or appellee, who has taken no steps to have a judgment against him reviewed, may not *attack* that judgment in this Court. In *United States* v. *American Railway Express Co.*, 265 U. S. 425, 435, this Court said:

> It is true that a party who does not appeal from a final decree of the trial court can not be heard in opposition thereto when the case is brought here by the appeal of the adverse party. In other words, the appellee may not attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary, whether what he seeks is to correct an error or to supplement the decree with respect to a matter not dealt with below.

This decision has not been overruled, and the cases upon which the respondent relies do not conflict with it.

In *Langnes* v. *Green*, 282 U. S. 531, this Court decided that a respondent in certiorari might advance in this Court, *in support of the judgment*, a ground which had been rejected by the court below. In reaching this result it cited and quoted with apparent approval from the opinion in *United States*

v. *American Railway Express Co.*, 265 U. S. 425, *supra*. See also *Story Parchment Co.* v. *Paterson Co.*, 282 U. S. 555, 560. This Court was not called upon in any of the cases cited to decide whether a respondent may attack the judgment below although he has filed no cross-petition for certiorari. Any language in the opinion in the *Langnes case* which might seem to relate to this question must be taken in the light of the fact that the *Langnes case* arose in admiralty, and, as this Court recognized in its opinion, an appeal in admiralty is a trial *de novo*.

The present case is an action at law. Under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, the writ of certiorari which this Court has granted on the petition of the United States brings the case before this Court "for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal." Under this statute it is plain that this Court's jurisdiction is the same as it would have been if the case had been brought here by the United States by writ of error or appeal. This Court has frequently decided that an appellee or a defendant in error may not attack the decree or judgment below, and we submit that these decisions, under the statute quoted above, are controlling here.

In *Fitchie* v. *Brown*, 211 U. S. 321, the point was directly decided by this Court. Counsel for the

appellees was permitted to file a brief and to argue against the decree below, "this court stating, however, that it would thereafter decide whether counsel for executors [appellees] had any right to be heard to contend against the decree of the court below." (P. 328.) The question was thus squarely presented for decision, and this Court disposed of it as follows (p. 329):

> We are of opinion that counsel for the executors had no right to appear and be heard against the decree, no appeal having been taken from it by his clients.

A similar result was reached in *Peoria Ry. Co.* v. *United States,* 263 U. S. 528, where this Court said (p. 536):

> But by failure to enter a cross appeal from the court's action in overruling its objection, the right to insist upon it here was lost. The appellees can be heard before this Court only in support of the decree which was rendered.

Another decision to the same effect is *Terminal R. R. Assn.* v. *United States,* 266 U. S. 17, 28–29. See also *The Maria Martin,* 12 Wall. 31, 40; *The Stephen Morgan,* 94 U S. 599; *Mount Pleasant* v. *Beckwith,* 100 U. S. 514, 527; *Bolles* v. *Outing Co.,* 175 U. S. 262, 268; *United States* v. *American Railway Express Co.,* 265 U. S. 425, 435, *supra.*

As all of these cases were decided prior to the enactment of the Act of February 13, 1925, the statute, under familiar principles, must be taken

to adopt and incorporate the rule which they establish. We have been unable to find any case in which this Court has held that it has jurisdiction to review a judgment or decree at the instance of a party who has not sought review by this Court by appeal, writ of error, or certiorari.

That this Court decided no more in *Langnes* v. *Green,* 282 U. S. 531, *supra,* than that the respondent may urge any ground in *support* of the decree below, even though he has filed no petition for certiorari, is, we believe, made clear by the decision in *Story Parchment Co.* v. *Paterson Co.,* 282 U. S. 555, 560, where this Court said:

> But respondents do not invoke that ground in order to overthrow the judgment of the court below, but to sustain it; and this they may do. *Langnes* v. *Green, ante,* p. 531.

For these reasons we submit that this Court is without jurisdiction to review the judgment below at the behest of the respondent, so far as the respondent seeks to have that judgment reversed. Any arguments which the respondent presents in support of the judgment below are, of course, open to him, under this Court's decision in *Langnes* v. *Green.*

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II

WHERE A GOING BUSINESS IS ACQUIRED BY A CORPORATION ORGANIZED FOR THAT PURPOSE AND THE ASSETS TRANSFERRED INCLUDE INTANGIBLE PROPERTY SUCH AS NAME AND GOOD WILL, FOR WHICH NO PAYMENT IS SPECIFICALLY MADE EITHER IN CASH OR STOCK, SUCH INTANGIBLES MAY NOT BE INCLUDED IN THE INVESTED CAPITAL OF THE SUCCESSOR CORPORATION

The record shows that the respondent was organized for the purpose of acquiring the going business of the Prentiss Tool & Supply Company. In effect the transaction was nothing more than a change of name with increased capitalization as the stock of the respondent was issued to the stockholders of the Prentiss Tool & Supply Company *pro rata* according to their former holdings, their interests remaining the same.

It is unquestionably true, and doubtless will be conceded by the respondent, that the transferror corporation could not have increased its invested capital by including therein the value of its intangible property such as name, good will, and sales contracts which had grown up with the business and which therefore had been acquired at no cost to that corporation. *La Belle Iron Works* v. *United States,* 256 U. S. 377. It is contended, however, that because of the transaction here involved, which, as stated above, resulted in nothing but a change of name with increased capitalization, the respondent is entitled to include these intangible assets in its invested capital.

The Prentiss Tool & Supply Company carried no items on its books reflecting a valuation of these intangibles and none was entered on the books of the respondent corporation. After the transfer of the assets had been effected the respondent entered on its books without change the identical assets which had been carried on the books of the predecessor corporation, making the necessary adjustments in capital and surplus due to the increased capitalization. Neither the balance sheet of the predecessor corporation nor the balance sheet of the successor corporation at the time of the transfer showed any item for the intangible assets referred to. The book value of the tangible assets both before and after the transfer was $938,894.35 and the actual cash value of the tangible assets was $994,564.43, or $55,067.08 in excess of the book value. (R. 2.) As stock of the new corporation, having a par value of only $490,000, was issued for all of the assets of the old corporation, it is apparent that the value of the tangible assets was in excess of the par value of the stock paid for the entire business leaving nothing to be applied in payment for the intangible assets.

It is the position of the petitioner in this case that intangible property may be included in invested capital in the situation here presented only where actual payment in cash or stock was specifically made for such intangibles and that unless

the bill of sale or the closing and opening balance sheets reflect the value of the intangibles they may not be included in the invested capital of the successor corporation. In other words, the parties to the transaction must have been consciously dealing with the intangible property as well as the tangible property, and the mere acquisition of those intangibles which are the necessary incidents of a going business is not sufficient to permit their inclusion in invested capital.

The respondent here endeavors to show that the parties were consciously dealing with the intangibles as well as the tangibles by referring to the resolutions of the two corporations at the time of transfer. While by these resolutions (R. 22, 24) one corporation agrees to sell and the other corporation agrees to purchase the "business property and assets, real and personal, including name, good will, contracts, and rights of every character and description, subject, however, to its debts and obligations, for the sum of $490,000," it is apparent that this language is intended merely as authorization by the stockholders of the respondent corporation to acquire a going business and authority by the Board of Directors of the predecessor corporation to sell its entire business. There was no attempt to place a valuation upon either the tangible or intangible property, the agreement being merely on the part of one corporation to acquire and on the part of the other to sell everything connected with the business for the lump

sum of $490,000, the stock in the new corporation to be accepted in lieu of cash.

Authority for including or excluding an asset as a part of invested capital must be found in the statutes. *Strong Publishing Co.* v. *Commissioner*, 56 F. (2d) 550 (C. C. A. 7th). "Invested capital" is a term of statutory concept and only those items which are specifically named in the statute may be included therein. *La Belle Iron Works* v. *United States, supra.* Section 326 (a) (4) of the Act (*infra*, p. 22) provides for the inclusion of intangible property bona fide paid in for stock or shares prior to March 3, 1917, in an amount not exceeding (a) the actual cash value of such intangibles at the time paid in, (b) the par value of the stock or shares issued for such property, or (c) in the aggregate 25 per cent of the par value of the total stock of the corporation outstanding on March 3, 1917, whichever is lowest.

It is plain that before any allowance for intangible property may be made the three elements or factors named in the statute must be present. In this case the provisions of the statute have not been satisfied, as the intangible property was not bona fide paid in for stock or shares. If it be assumed, for purposes of discussion, that such property was bona fide paid in for stock or shares, it would still be impossible to determine what amount should be included in invested capital because of the acquisition of these intangibles. In determining the value at which intangible property bona fide paid in for

stock or shares may be included in invested capital, it is essential that all three restrictions be considered in order to determine the lowest figure at which the intangibles may be included, and if the facts applying to any one of the restrictions is lacking it is impossible to make the inclusion under the clear terms of the statute. Here the facts applying to restriction (b) are absent, as no stock was issued specifically for the intangible assets. Therefore, one of the three requirements necessary for consideration under the statute is absent. This failure to prove a fact necessary to establish the illegality of the tax is fatal to the taxpayer's contention. *Niles Bement Pond Co.* v. *United States,* 281 U. S. 357.

In the case at bar where the transfer was made of a going business with all of its incidents for a lump sum without the allocation at time of sale of any part of the amount paid to either tangible or intangible property, it is clear that the payment was made for a mixed aggregate of both tangible and intangible property. In such a situation it is impossible to determine statutory invested capital because of the restrictions in the statute against granting any allowance for the intangible property paid in. However, Congress has carefully provided against hardships on the taxpayer in this situation by enacting Section 327 of the Revenue Act of 1918 (*infra,* pp. 23–24), permitting the Commissioner of Internal Revenue to grant special assessment to those taxpayers whose invested capital could not be determined under Section 326 and

where their excess-profits tax was disproportionate to that of other taxpayers engaged in a similar business.

As stated by the respondent the Board of Tax Appeals has held that where a mixed aggregate of tangible and intangible property is acquired for stock or shares, the par value of the stock may be apportioned between the two classes of property in proportion to their respective actual values at the time of transfer. This results in the inclusion of a portion of the intangibles in invested capital with a corresponding increase in the allowance for tangibles as paid-in surplus. The first decision on this point was the *Appeal of the St. Louis Screw Company,* 2 B. T. A. 649. That case was decided by the Board September 8, 1925, and the Commissioner of Internal Revenue acquiesced therein.

The courts to which this question has been presented have not been uniform in their decisions.

In *Lewis A. Crossett Company* v. *United States,* 72 C. Cls. 292, the situation of the parties was very similar to that in the instant case. The plaintiff at the time of its organization acquired all of the assets of every name, kind, and character of Lewis A. Crossett, Inc., including good will, trade-marks, trade-names, and both tangible and intangible personal property, and issued and paid therefor $749,000 par value of its stock. The transfer was made upon an agreed balance sheet which did not list

any item for the intangible property transferred, and the value of the tangible assets was in excess of the par value of the stock paid for the entire business.

In that case, as here, the plaintiff contended that it was entitled to include in its invested capital the value of the intangible property received, as restricted by the statute, and based upon an allocation of the stock pro rata to the tangible and intangible property acquired. As a basis for its contention the plaintiff relied upon the case of the *St. Louis Screw Company, supra,* before the Board of Tax Appeals.

In rejecting the plaintiff's contentions the Court of Claims said (p. 299):

> The good will which the statute authorizes to be included in invested capital is that for which payment has been made *bona fide,* "specifically as such," or good will *bona fide* purchased prior to named dates. *Stewart Electric Co.* v. *United States,* 65 C. Cls. 21.
>
> Intangible property *bona fide* was not paid in for stock or shares on the transfer of the assets of the predecessor corporation to the plaintiff, and there can be no inclusion of good will in plaintiff's invested capital. A paid-in surplus may not be allowed in respect of an intangible asset. *Colorado Continental Lumber Co.* v. *United States,* 70 C. Cls. 413; *Daily Pantagraph, Inc.,* v. *United States,* 68 C. Cls. 251.

In *Landesman-Hirschheimer Co.* v. *Commissioner*, 44 F. (2d) 521, the Circuit Court of Appeals for the Sixth Circuit had for consideration substantially the same question here presented. The case was on appeal from the the Board of Tax Appeals (15 B. T. A. 64) which sustained the determination of the Commissioner on this point on the ground that the taxpayer had failed to prove the acquisition of good will at the time the business was taken over. The taxpayer appealed from the ruling of the Board and again urged its contention before the Circuit Court of Appeals. In rejecting the position of the taxpayer the court said (pp. 522–523):

> The chief insistence on the part of the petitioner is that the Commissioner and Board erred in refusing to include an item of at least $81,250 as good will, in arriving at the amount of invested capital. No item of good will was included upon the asset side of the petitioner's financial statement from the time of its organization in 1896 to the present time. The business was founded in the year 1875 and was carried on as a sole proprietorship until 1880, when Landesman, the founder, took a partner. It was conducted as a partnership from 1880 to January 2, 1897, when a book value of $273,346.21 of assets of the partnership was turned over to the petitioner in return for $249,000 par value of capital stock. The corporation set up a reserve for discounts on accounts re-

ceivable of $7,439.08, which item may or may not fall within the principles above discussed, and the remaining excess of assets over liabilities was treated as a paid-in surplus of $15,907.13. As already stated, the assets contain no item of good will, although undoubtedly the good will of the business passed to the corporation and was of substantial value. The sole question is whether, more than twenty years later, this item may be inserted nunc pro tunc, to increase the valuation of assets adopted by the parties, with a corresponding increase in paid-in surplus, simply because it must be conceded that the good will, whatever it was, passed to the corporation, and that it was a thing of value.

* * * * *

It may be conceded that the good will of the partnership at the time of incorporation was intangible property which was paid in as part consideration for the shares issued for the aggregate of tangible and intangible property, but, even conceding this fact, we are met by the condition (b) limiting the sum, which is permitted to be included in invested capital, to the par value of stock or shares "issued therefor." With reference to tangible property the act provides that the included value shall "in no case exceed the par value of original stock or shares specifically issued therefor." We see no distinction of expressed intent between the language there used and that used with ref-

erence to intangible property. On the contrary, we are of the opinion that, in order to warrant the inclusion of good will, a valuation must have been placed upon it as of the time it was acquired, and such valuation must have consciously formed the consideration for, and operated to discharge the subscriber's liability arising out of, the issue of a specific amount of capital stock. It is authoritatively determined that "invested capital" is to be determined upon actual "cost" to the individuals organizing and conducting an enterprise, plus surplus accumulated in such business from earnings (not write-ups), and retained for its conduct. *La Belle Iron Works* v. *U. S.*, 256 U. S. 377, 388, 41 S. Ct. 528, 65 L. Ed. 998. The idea carries with it that of the conversion of wealth from one form to another by that which is in effect a sale of property to be paid for in stock, and the act limits the values to be included in invested capital, not only to the actual cash value of the property so sold or transferred, whether tangible or intangible, but likewise to the par value of the stock or shares which formed the consideration for the purchase. That which is given to the corporation without this consideration of stock issued, or without the specified quid pro quo, is not to be considered as augmenting the original invested capital. Thus under the congressional definition, borrowed money, or property obtained by bond issues, is not to be included. Cf. *Baker &*

Taylor Co. v. *U. S.*, 26 F. (2d) 187 (C. C. A. 2).

> Nor can a valuation of good will as of that time be now included in invested capital as part of the surplus then paid in but inadvertently omitted from the statement. Surplus is but a balance figure, and would be increased by any addition to the assets; but the effect of the statutory definition of "invested capital" is, we think, to definitely limit and restrict the extent to which good will or other intangible assets may be used to so increase the paid-in surplus. The provision of the act covering paid-in surplus being general, and the restrictions upon the inclusion of intangible property in invested capital being specific, the limitations provided with reference to such intangible property must apply, and prevent that which can not be considered part of invested capital as intangible property from being so considered as part of paid-in surplus.

The decision of the Circuit Court of Appeals for the Seventh Circuit in *Strong Publishing Co.* v. *Commissioner*, 56 F. (2d) 550, *supra*, is at variance with the decisions of the Court of Claims and the Circuit Court of Appeals for the Sixth Circuit, shown above. In that case the Board of Tax Appeals rejected the contention of the taxpayer that good will, circulation structure, and an Associated Press membership acquired gratuitously was includable in invested capital as paid-in surplus, and while the Circuit Court of Appeals sustained this

ruling it did permit the inclusion of these intangibles, as restricted by the statute, under sub-section (4) of Section 326 (a) of the Revenue Act of 1918 (*infra*, p. 22). The determination of the court on this point is not supported by any reasoning set out in its opinion, and it is submitted that the conclusions reached by the Circuit Court of Appeals for the Sixth Circuit in the *Landesman-Hirschheimer case, supra,* by the Court of Claims in the *Crossett case, supra,* and by the Circuit Court of Appeals for the Second Circuit in the present case, that intangible property may not be included in invested capital unless paid for specifically by stock or shares, are supported by sound and logical reasoning and properly reflect the intention of Congress on this point.

In view of the stringent limitations placed by Congress upon the items which are properly includable in invested capital we believe the respondent's contention can not prevail.

III

THE CLAIM FOR REFUND FILED BY THE RESPONDENT ON MARCH 25, 1924, DID NOT SET FORTH AS A GROUND THAT IT WAS ENTITLED TO INCLUDE IN ITS INVESTED CAPITAL THE INTANGIBLE PROPERTY RECEIVED AT THE TIME IT WAS ORGANIZED

The contentions of the petitioner on the issue on which the writ of certiorari was issued are applicable also to this point. (Petitioner's Brief, pp. 5–13.) The claim for refund filed March 25, 1924,

did not specify as a ground that the respondent was entitled to include in its invested capital the value of the intangible assets received on the date of its organization. As this point has been fully presented in petitioner's prior brief, it is not set forth again in this brief.

CONCLUSION

The decision of the Circuit Court of Appeals is correct and should be affirmed.

Respectfully submitted.

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APPENDIX

STATUTES INVOLVED

Sections 326 and 327 of the Revenue Act of 1918, c. 18, 40 Stat. 1057, 1092, 1093, provide as follows:

> SEC. 326. (a) That as used in this title the term "invested capital" for any year means (except as provided in subdivisions (b) and (c) of this section):
>
> (1) Actual cash bona fide paid in for stock or shares;
>
> (2) Actual cash value of tangible property, other than cash, bona fide paid in for stock or shares, at the time of such payment, but in no case to exceed the par value of the original stock or shares specifically issued therefor, unless the actual cash value of such tangible property at the time paid in is shown to the satisfaction of the Commissioner to have been clearly and substantially in excess of such par value, in which case such excess shall be treated as paid-in surplus: *Provided,* That the Commissioner shall keep a record of all cases in which tangible property is included in invested capital at a value in excess of the stock or shares issued therefor, containing the name and address of each taxpayer, the business in which engaged, the amount of invested capital and net income shown by the return, the value of the tangible property at the time paid in, the par value of the stock or shares specifically issued therefor, and the amount in-

cluded under this paragraph as paid-in surplus. The Commissioner shall furnish a copy of such record and other detailed information with respect to such cases when required by resolution of either House of Congress, without regard to the restrictions contained in section 257;

(3) Paid-in or earned surplus and undivided profits; not including surplus and undivided profits earned during the year;

(4) Intangible property bona fide paid in for stock or shares prior to March 3, 1917, in an amount not exceeding (a) the actual cash value of such property at the time paid in, (b) the par value of the stock or shares issued therefor, or (c) in the aggregate 25 per centum of the par value of the total stock or shares of the corporation outstanding on March 3, 1917, whichever is lowest;

(5) Intangible property bona fide paid in for stock or shares on or after March 3, 1917, in an amount not exceeding (a) the actual cash value of such property at the time paid in, (b) the par value of the stock or shares issued therefor, or (c) in the aggregate 25 per centum of the par value of the total stock or shares of the corporation outstanding at the beginning of the taxable year, whichever is lowest: *Provided,* That in no case shall the total amount included under paragraphs (4) and (5) exceed in the aggregate 25 per centum of the par value of the total stock or shares of the corporation outstanding at the beginning of the taxable year; but

(b) As used in this title the term "invested capital" does not include borrowed capital.

(c) There shall be deducted from invested capital as above defined a percentage thereof equal to the percentage which the amount of

inadmissible assets is of the amount of admissible and inadmissible assets held during the taxable year.

(d) The invested capital for any period shall be the average invested capital for such period, but in the case of a corporation making a return for a fractional part of a year, it shall (except for the purpose of paragraph (2) of subdivision (a) of section 311) be the same fractional part of such average invested capital.

The average invested capital for the prewar period shall be determined by dividing the number of years within that period during the whole of which the corporation was in existence into the sum of the average invested capital for such years.

SEC. 327. That in the following cases the tax shall be determined as provided in section 328;

(a) Where the Commissioner is unable to determine the invested capital as provided in section 326;

(b) In the case of a foreign corporation;

(c) Where a mixed aggregate of tangible property and intangible property has been paid in for stock or for stock and bonds and the Commissioner is unable satisfactorily to determine the respective values of the several classes of property at the time of payment, or to distinguish the classes of property paid in for stock and for bonds, respectively;

(d) Where upon application by the corporation the Commissioner finds and so declares of record that the tax if determined without benefit of this section would, owing to abnormal conditions affecting the capital or income of the corporation, work upon the corporation an exceptional hardship evi-

denced by gross disproportion between the tax computed without benefit of this section and the tax computed by reference to the representative corporations specified in section 328. This subdivision shall not apply to any case (1) in which the tax (computed without benefit of this section) is high merely because the corporation earned within the taxable year a high rate of profit upon a normal invested capital, nor (2) in which 50 per centum or more of the gross income of the corporation for the taxable year (computed under section 233 of Title II) consists of gains, profits, commissions, or other income, derived on a cost-plus basis from a Government contract or contracts made between April 6, 1917, and November 11, 1918, both dates inclusive.

U. S. GOVERNMENT PRINTING OFFICE: 1932